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POSITION ON PROPOSED LEGISLATION

**BILL: SB0047 Evidence – Wiretapping and Electronic Surveillance – Fair Housing
Testing**

FROM: Maryland Office of the Public Defender

POSITION: Informational Only

DATE: 1/30/2023

The Maryland Office of the Public Defender takes no position on the intent of Senate Bill 47, to authorize the interception of wire, oral or electronic communication by a Fair Housing tester for the purpose of obtaining evidence of a fair housing violation under federal, state, or local law. However, the bill as written does not provide any limitations on the use of these interceptions. We strongly oppose allowing for interceptions created as part of civil rights investigations to open the door for those interceptions to be used to assist with criminal investigations or prosecutions.

Maryland’s two-party consent provision is an intentional measure to provide greater privacy protections than available under federal law. *Mustafa v. State*, 323 Md. 65, 74 (1991). “The requirement of consent by all parties for the recording of a telephone conversation by a private individual has been a fundamental part of Maryland law since at least 1956,” and protects the privacy interests of all individuals, even when accused of serious crimes. *Perry v. State*, 357 Md. 37, 61 (1999) (reversing murder conviction that relied on wiretap by co-conspirator).

While Senate Bill 47 is focused on fair housing investigations, it does not limit the use of the intercepted communications to this purpose. Other exceptions for investigative purposes rely on law enforcement, who are trained in criminal investigations and the constitutional protections implicated, are often limited to the narrow scope of a court order, and are accountable within the criminal justice process. In comparison, Fair Housing testers are often part-time consultants or volunteers whose training does not address criminal investigations, privacy protections, or the constitutional rights implicated by a recording. They are likely to lack the expertise to know

when to stop recording, but they enter residential locations where they are likely to interact with others and may intercept statements beyond the intended purpose of the investigation. Moreover, while not considered law enforcement, their role is directly for civil prosecutorial purposes.

Current exceptions authorizing interceptions, procurements, disclosures, or use of communications in Courts and Judicial Proceedings § 10-402(C) are extremely limited in order to ensure that privacy interests retain as much protection as possible. For example, § 10-402(C)(6), which authorizes “law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy,” does not allow for these communications to be recorded or used against a defendant in a criminal proceeding. Here, where the intent of the recording is even more attenuated from criminal activity, but could potentially intercept communications beyond its stated purpose, a similar protection is warranted.

For these reasons, the Maryland Office of the Public Defender urges this Committee to consider the above information and amend SB 47 accordingly should it choose to issue a favorable report.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

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